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IN THE

Supreme Court of the United States

ABDUL KARIM ALHALABI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit erred in holding that payments to retailers participating in the Food Stamp Program in essence constitute food stamp benefits and are cognizable under the Food Stamp Fraud-statute, 7 U.S.C. § 2024?

2. Whether the United States Court of Appeals for the Seventh Circuit erred by holding that the Indictment was not constructively amended where (a) the Indictment charged that payments to a retailer participating in the Food Stamp Program constituted the "presentation" of food stamp benefits "for payment or redemption" (in violation of 18 U.S.C. § 1343) and the "acquisition, transfer and possession" of food stamp benefits (in violation of 18 U.S.C. § 2024(b)) but (b) the government's trial evidence and arguments portrayed the retailer payments as payments of money to the retailer — not food stamp benefits or activities therewith — and the government offered evidence of actual food stamp transactions that were not charged in the Indictment?

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The Petitioner, Abdul Karim Alhalabi, respectfully submits this Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on April 11, 2006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 443 F.3d 605 (7th Cir. 2006) and is reprinted in the Appendix hereto at page 1a. The Order of the United States Court of Appeals for the Seventh Circuit denying Alhalabi's Petition for Rehearing with Suggestion for Rehearing *En Banc* is reprinted in the Appendix hereto at 27a-28a. The opinion of the United States District Court for the Northern District of Illinois addressing the questions presented by petitioner Alhalabi is reprinted in the appendix hereto at page 19a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit affirmed Petitioner Alhalabi's conviction and sentence on April 11, 2006. A timely petition for rehearing was denied on May 8, 2006. This Court has jurisdiction to review the Seventh Circuit's decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY AUTHORITY INVOLVED

I. Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. 7 U.S.C. § 2024(b) and (c)

7 U.S.C. § 2024(b) Unauthorized use, transfer, acquisition, alteration, or possession of coupons or authorization cards; restitution by convicted individuals:

(1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this chapter or the regulations issued pursuant to this chapter shall, if such coupons, authorization cards, or access devices are of a value of $5,000 or more, be guilty of a felony and shall be fined not more than $250,000 or imprisoned for not more than twenty years, or both, and shall, if such coupons or authorization cards are of a value of $100 or more, but less than $5,000, or if the item used, transferred, acquired, altered, or possessed is an access device that has a value of $100 or more, but less than $5,000, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000 or, if such coupons or authorization cards are of a value of less than $100, or if the item used, transferred, acquired, altered, or processed is an access device that has a value of less than $100, shall be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year,

or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

(2) In the case of any individual convicted of an offense under paragraph (1) of this subsection, the court may permit such individual to perform work approved by the court for the purpose of providing restitution for losses incurred by the United States and the State agency as a result of the offense for which such individual was convicted. If the court permits such individual to perform such work and such individual agrees thereto, the court shall withhold the imposition of the sentence on the condition that such individual perform the assigned work. Upon the successful completion of the assigned work the court may suspend such sentence.

7 U.S.C. § 2024(c)

Presentation for payment or redemption of coupons that have been illegally received, transferred, or used: Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony and, upon the first conviction

thereof, shall be fined not more than $20,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than one year nor more than five years and may also be fined not more than $20,000, or, if such coupons are of a value of less than $100, shall be guilty of a misdemeanor and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

III. 18 U.S.C. § 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

IV. 18 U.S.C. § 3282(a)

> **(a) In general.** Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

V. 7 U.S.C. § 2012(d)

> "Coupon" means any coupon. stamp, type of certificate, authorization card, cash or check issued in lieu of a coupon, or access device, including an electronic benefit transfer card or personal identification number, issued pursuant to the provisions of this chapter.

VI. 7 C.F.R. § 271.2

> Coupon means any coupon, stamp, type of certificate, authorization card, cash or check issued in lieu of a coupon, or access device, including an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food Stamp Act of 1977, as amended, for the purchase of eligible food.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

On October 8, 2003, a grand jury handed up an Indictment alleging that petitioner Abdul Karim Alhalabi, one time owner of Holyland Foods, had engaged in a pattern of fraudulent food stamp transactions. The Indictment charged Alhalabi with three counts of wire fraud in violation of 18 U.S.C. §§ 2, 1343 (Counts 1-3) and three counts of food stamp fraud in violation of 7 U.S.C.

§§ 2024(b) and (c) (Counts 4-6). R. 1, Indictment.[1] At the time that the Indictment was returned, the government knew of no fraudulent food stamp transactions at Holyland that were not time barred by the statute of limitations[2] and so, in order to evade the strictures of the statute of limitations, the government charged three "electronic funds transfers" from Transactive Corporation of Austin, Texas to Holyland's account at Firstar Bank in Chicago — monies that Holyland had received as reimbursement for food stamp and other LINK card[3]

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1. "Appendix __" signifies a citation to the Appendix to this Petition. "R. _____ (_____)" denotes a citation to the Record and the title of the cited document. "Tr. ___" signifies a citation to the transcript of the trial. "GX__" and "DX__" denote citations to the government's and Petitioner Alhalabi's trial exhibits respectively.

2. The government had conducted allegedly illegal undercover food stamp transactions at Holyland, but these transactions occurred in March and April, 1998 and thus could not form the basis for criminal charges by the time that the Indictment was handed up on October 8, 2003. Tr. 549-58; 565-79. Holyland's participation in the food stamp program ended on October 9, 1998. Tr. 150-51. At the time that the government obtained the Indictment, it knew of no illegal food stamp transactions that had occurred at Holyland during, or anywhere close to, the few days in October, 1998 that remained within the five year limitations period. *See, e.g.*, R. 66 (Alhalabi's Further Response In Opposition To Motion To Strike Surplusage, Exhibit B (Agent Swain Grand Jury Testimony) (disclosing to grand jury no October, 1998 illegal food stamp transactions)).

3. In 1997, the Food Stamp program in Illinois switched from paper coupons to an "electronic benefit transfer" system in which food stamp benefits were made available to recipients monthly on "LINK" cards that were swiped through point of sale devices each time the recipients purchased food. Tr. 132-33. The amount of the purchase was then deducted from the amount of benefits that had been made available to the recipient for that month. *Id.* LINK cards also were used to provide Illinois cash assistance benefits to qualified recipients. Tr. 133-34, 211-

(Cont'd)

transactions — as if they were the illegal food stamp transactions that the government lacked.

Thus, each wire fraud count charged that Alhalabi violated the wire fraud statute by:

> . . . knowingly caus[ing] to be transmitted for payment and redemption United States Department of Agriculture Electronic Benefit Transfer food stamp benefits by wire communication in interstate commerce, certain signs, signals and sounds, namely an electronic funds transfer in the amount of . . . to Firstar Bank, Chicago, Illinois, for deposit into account no. 417079341, held in the name of 'Holyland Foods, Inc.,' from Austin, Texas to Chicago, Illinois.

R.1, Indictment, Count 1, ¶ 11, Counts 2, 3. The food stamp fraud counts similarly charged the payments into Holyland's bank account as if they were food stamp benefits, alleging that Alhalabi:

> . . . did knowingly acquire, transfer and possess United States Department of Agriculture Electronic Transfer Card benefits, namely, LINK benefits . . . in that he knowingly and unlawfully caused an electronic payment . . . to be made to Firstar Bank, Chicago, Illinois, for deposit into account no. 417079341, held in the name of 'Holyland Foods, Inc.,' knowing these LINK benefits to have been received, transferred and used in a manner not authorized. . . .

Indictment, Counts 4-6.

(Cont'd)

12. As noted *infra*, retailers participating in the Food Stamp or Illinois cash assistance programs were reimbursed each business day by a wire transfer of funds to their bank accounts in the amount of the prior day's Link card transactions. Tr. 136-38, 437-39, 481-83.

On its very face, the Indictment flatly contradicted itself and set forth counts that both charged no offense and could never be proved. As explained more fully below, the monies that a retailer receives for participating in the food stamp program are neither food stamp benefits nor any of the activities therewith charged in the Indictment. Thus, while the wire fraud counts alleged that Alhalabi furthered a scheme, and violated the wire fraud statute, by "transmitt[ing] for payment and redemption . . . food stamp benefits," the conduct that is alleged to constitute these claimed wires is in fact the electronic transfer of funds into Holyland's bank account. And while the food stamp fraud counts alleged that Alhalabi "knowingly acquire[d], transfer[red] and possess[ed] . . . [food stamp] . . . benefits," the conduct that is alleged to constitute these claimed acquisitions, transfers and possessions of food stamp benefits is the electronic transfer of funds into Holyland's bank account.

At trial, the government did not argue, and made absolutely no effort to prove, that the electronic funds transfers that Holyland received were either food stamp benefits (as charged in all counts of the Indictment) or the transmission of food stamp benefits for payment or redemption (as charged in the wire fraud counts) or the acquisition, transfer or possession of food stamp benefits (as charged in the food stamp fraud counts). Instead, the government marched away from its own charges (and over the Fifth Amendment and the statute of limitations) and presented a fundamentally different case at trial than the one charged in the Indictment.

In the case presented at trial, the government introduced evidence, and argued, that the payments to Holyland were just that – payments to Holyland – and that those payments violated the wire fraud statute not because they transmitted food stamp benefits for payment or redemption, as charged in the Indictment, but because they transmitted to Holyland (and thus to Alhalabi)

the fruits of fraudulent food stamp transactions that occurred in the store – a completely different wire fraud theory that is nowhere charged in the Indictment. Nor did the government's evidence of fraudulent food stamp transactions match what was charged in the Indictment. The Indictment charged that the electronic funds transfers to Holyland were the food stamps and the allegedly illegal food stamp transactions at issue. But at trial, the government introduced evidence from four food stamp recipients whom the government claimed conducted fraudulent food stamp transactions at Holyland during or very near the time period covered by the Indictment and pointed to these actual, in-store food stamp transactions, which are no where charged in the Indictment, as the illicit food stamp transactions at issue. The government thus forestalled the running of the statute of limitations by obtaining an Indictment that was timely but legally and factually insufficient and then the government obtained a conviction by presenting at trial a time-barred case that was the exact opposite of what the Indictment charged and was built long after the running of the statute of limitations. The prejudice to Alhalabi could not have been greater.

Alhalabi subsequently challenged his conviction on appeal by arguing, among other things, that because payments to retailers are neither food stamp benefits nor any of the charged activities therewith: (1) the Indictment stated no offense, (2) none of the charges in the Indictment were proved, (3) the jury instructions were flawed because they did not require the government to prove that the payments to Holyland either were food stamp benefits or any of the charged activities therewith and (4) the trial evidence and jury instructions constructively amended the Indictment because the government thereby presented the unindicted, time-barred case described above. The United States Court of Appeals for the Seventh Circuit rejected these and the other arguments raised by Alhalabi in an opinion issued on April 11, 2006 and a timely petition for rehearing was denied on May 8, 2006. Appendix, 27a-28a.

As explained more fully below, Petitioner Alhalabi respectfully submits that in rejecting these contentions, the Seventh Circuit committed two fundamental errors that warrant review by this Court. *First*, the Seventh Circuit in effect held that payments to a retailer participating in the food stamp program constitute food stamp benefits and the charged activities therewith (presentation for payment or redemption and acquisition, transfer and possession). This ruling flies in the face of the laws and regulations governing the food stamp program and stands the food stamp program on its head. *Second*, even as the Seventh Circuit held that retailer payments are in effect food stamp benefits and activities therewith, the Seventh Circuit also interpreted the Indictment to charge, first, that the payments to Holyland violated the wire fraud statute because they transmitted to Alhalabi the fruits of the food stamp fraud scheme (i.e. monies), not because they transmitted food stamps for payment and redemption as the Indictment in fact charged, and, second, that the illegal food stamp transactions at issue in the food stamp fraud counts were actual, in-store transactions, not payments to Holyland as charged in the Indictment. This ruling — and the Seventh Circuit's corresponding holding that the Indictment was not constructively amended despite a huge gap between the actual language of the Indictment and the trial evidence — contravene both the Fifth Amendment's requirement that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" and this Court's decision in *Stirone v. United States*, 361 U.S. 212 (1960), which prohibits trying a defendant on charges not set forth in an Indictment after having been returned by a Grand Jury. This ruling also cannot be reconciled with the Seventh Circuit's own prior decisions — such as *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991); *United States v. Pigee*, 197 F.3d 897 (7th Cir. 1999) and *United States v. Willoughby*, 27 F.3d 263 (7th Cir. 1994) — and similar decisions of other Circuit Courts of Appeal, all of which have required the government to prove the actual charges set forth in the

Indictment and not different, unindicted charges. Alhalabi respectfully submits that, as a result of these two fundamental errors, the Seventh Circuit incorrectly rejected his challenge to the Indictment, the sufficiency of the evidence, the jury instructions and the constructive amendments of the Indictment.

Accordingly, as explained more fully below, Petitioner Alhalabi respectfully submits that the Seventh Circuit therefore has decided an important question of federal law in a way that conflicts with governing statutes and regulations and issued a decision that conflicts with basic precedent of this Court, its own precedent and precedent from other Courts of Appeals on fundamental principles.

II. FACTUAL BACKGROUND

As noted above, this case arose from the participation of Holyland Foods — a Chicago grocery store that was owned by Holyland Foods, Inc., a corporation which was once owned by Petitioner Alhalabi — in the Food Stamp Program. In summary, the trial evidence disclosed the following:

A. The Food Stamp Program In Illinois

The Food Stamp Program is a federal program that provides benefits to low income families so that they can purchase nutritious food. Tr. 130. The United States Department of Agriculture administers the Food Stamp program at the federal level and provides the funds for the program. Tr. 131. In Illinois, the program is administered in large part by the Illinois Department of Human Services (which in part was formerly part of the Illinois Department of Public Aid), which determines whether persons are eligible to participate in the Food Stamp Program and uses a contractor to administer the day-to-day processing of individual transactions in which benefits are used to purchase food and the reimbursement of retailers who provide food in exchange for benefits. Tr. 130-31, 212-14.

Initially, food stamp benefits were distributed in the form of paper coupons. Tr. 132. However, beginning in March, 1997,

Illinois began distributing food stamp benefits through issuing LINK cards to food stamp assistance recipients. Tr. 132. A LINK card is "similar to a debit card or a bank card." Tr. 132. Benefits "are added to a recipient's LINK card once a month." *Id.* A recipient seeking to purchase food with food stamp benefits swipes his or her LINK card through a point of sale device and enters a personal identification ("pin") number. Tr. 132-33. If the recipient has sufficient benefits available to pay for the food, the transaction is approved, the amount of benefits necessary to pay for the food is deducted from the overall amount of benefits available on the recipient's LINK card and the merchant provides the food to the recipient. Tr. 132-33.

LINK cards also are used in Illinois to disburse cash assistance. Tr. 133-34, 211-12. When a recipient of cash assistance accesses his or her benefits through a LINK card, the card is swiped through a point of sale device and a pin number is entered, just as in food stamp transactions, but instead of receiving food the recipient receives cash. Tr. 134. A public aid recipient who is issued a LINK card may receive food stamp benefits or cash assistance or both on the same LINK card. Tr. 134-135. A button on the point of sale device is used to distinguish between food stamp and cash assistance transactions. Tr. 135.

Food stamp benefits may only be used to purchase eligible food items such as "meat, poultry, grains, dairy products, bakery products" and cannot be used to purchase items such as food "that's cooked in the store" or alcohol or tobacco. Tr. 133. Recipients are not allowed to trade food stamp benefits for cash. *Id.* Retailers participating in the Food Stamp and/or cash assistance programs in Illinois usually were reimbursed each business day for food stamp and/or cash assistance transactions conducted in their store on the immediately preceding business day. Tr. 136-138, 481-83. During the time periods at issue herein, Transactive Corporation of Austin, Texas provided payments

to retailers participating in the food stamp and/or cash assistance programs in Illinois. Tr. 437-439.

Only authorized stores may participate in the Food Stamp Program. Tr. 135-41. The Chicago field office of the Food and Nutrition Service determines whether stores seeking to participate in the food stamp program may do so. Tr. 129, 136.

B. Holyland's Participation In The Food Stamp Program

Holyland submitted an application to participate in the Food Stamp Program on October 6, 1993. GX Group 1, 20-23; Tr. 159-63. The application was signed by Petitioner Alhalabi as President of Holyland. GX Group 1 at 20, 21, 23; Tr. 160-61. Among other things, the application reported estimated annual gross sales for Holyland of $240,000.00 and annual food sales (i.e. excluding "tobacco, alcoholic beverages" and "other non-food items") of $190,000.00. GX Group 1 at 23. The application contained a Certification and Signature of Owner certifying, among other things, that Petitioner Alhalabi had reviewed and understood the Food Stamp Program regulations, that he accepted responsibility on behalf of Holyland to prevent violations of the governing regulations (including a prohibition upon "trading cash for food stamps") and that he accepted responsibility on behalf of the firm for any violations that did occur. GX Group 1 at 23. Holyland submitted a similar "application to be reauthorized" for participation in the Food Stamp Program on August 17, 1996. GX Group 1 at 44-45; Tr. 166. Holyland's reauthorization application was approved on December 31, 1996. GX Group 1 at 44; Tr. 166.

C. The Termination Of Holyland's Participation In The Food Stamp Program

Food and Nutrition Service records reflect that the amount of Food Stamp benefits redeemed at Holyland was $22,285.48 in May 1997. GX Group 1 at 1 ("Store Redemption History

Summary" for Holyland); Tr. 147. For the months thereafter through October 9, 1998, when the point of sale device was removed from Holyland (*see infra*), the amount of Food Stamp benefits redeemed at Holyland rose significantly, GX Group 1 at 1; Tr. 147-150, including $59,086.32 in June, 1997, $97,372.53 in July, 1997, $139, 436.65 in August, 1997, $184,256.56 in October, 1997 and $148,783.52 in November, 1997. GX Group 1 at 1; Tr. 149-50.

In January, 1998, the Food and Nutrition Service sent a letter addressed to Alhalabi as President of Holyland, stating that "there is reason to believe that you, doing business as Holyland Foods, Incorporated, have violated the terms and conditions of the regulations governing the Food Stamp Program. . . . " R. 50 (December 13, 2004 Memorandum Opinion and Order) at 1. The Food and Nutrition Service disqualified Holyland from the Food Stamp Program in August, 1998. *Id* at 2. Holyland sought administrative review of this decision, which was affirmed by an administrative review officer in March, 1999. *Id.* On October 9, 1998, the point of sale device was removed from Holyland. Tr. 150-51.

D. The Government's Investigation Of Holyland

In addition to the disqualification proceedings brought against Holyland, Department of Agriculture agents entered Holyland undercover numerous times in Spring 1998. On March 20, 1998, Department of Agriculture agent Yvonne Meeks entered Holyland undercover and attempted to exchange food stamp benefits for cash. Tr. 549-52, 558-59. There were two employees in the store at the time and Meeks was turned down. Tr. 552, 557-58.

Department of Agriculture Agent Mireille Swain testified that she entered Holyland undercover on April 3, 8, 13 and 14, 1998 and exchanged food stamp benefits for cash on each visit. Tr. 565-79. In June, 1998, Swain returned to Holyland to try to

identify the persons involved in the April, 1998 undercover exchanges. Tr. 657-59. Alhalabi was never present at any time that Agent Swain was at Holyland, whether in April or June, 1998, and he was not involved in the April exchanges Swain conducted. Tr. 582-83, 659.

E. The Indictment

On October 8, 2003, nearly five years to the day after the LINK card machine was removed from Holyland, the Indictment in this case was returned, charging Alhalabi with violating 18 U.S.C. §§ 2, 1343 and 7 U.S.C. § 2042(b), (c) on each of three consecutive days: October 8, 9 and 10, 1998. R. 1 (Indictment), Counts 1 - 6. The Indictment alleged at length a "scheme" that began "no later than in or about July, 1997" to defraud the United States Department of Agriculture and the State of Illinois by exchanging LINK card benefits for discounted amounts of cash (*e.g.*, a $125 LINK card swipe in exchange for $80 cash and no food). *Id.*, Count 1. The Indictment alleged that Alhalabi participated in the "scheme," but offered no specifics with respect to his alleged participation. *Id.*, *passim*. The Indictment did allege that three persons (none of whom were alleged to be Alhalabi, instead being identified as individuals "A," "B" and "C") participated in specific food stamp/cash exchanges while working at Holyland on April 3, 8, 13 and 14, 1998. *Id.*, Count 1. However, none of these exchanges were charged as offenses. *Id.*, *passim*. Indeed, nowhere in the Indictment did the government charge any LINK card transaction as a violation of any law. *Id.* Instead, as noted above, the Indictment charged that Alhalabi violated 7 U.S.C. §§ 2024(b), (c) and 18 U.S.C. §§ 2, 1343 by fraudulently causing Transactive to transfer into Holyland's account at Firstar Bank $2,033.54 on October 8, 1998 (*Id.*, Counts One and Four), $4,415.32 on October 9, 1998

(*Id.*, Counts Two and Five) and $1,571.21 on October 10, 1998 (*Id.*, Counts Three and Six).[4]

F. Trial

Trial commenced on January 31, 2005. Tr. 3. For purposes of this Petition, the significant aspect of the trial is that, in presenting its case, the government departed almost completely from the charges set forth in the Indictment. In particular, the government made no effort whatsoever to prove or argue that the payments to Holyland either were food stamp benefits (as charged in all counts of the Indictment) or the presentation of such benefits for payment or redemption (as charged in the wire fraud counts) or the acquisition, transfer or possession of such benefits (as charged in the food stamp fraud counts). Instead, the government offered testimony from four food stamp recipients whom the government claimed conducted fraudulent food stamp transactions at Holyland during (or near) the time period covered by the Indictment (Tr. 262-394) and computer records of in-store transactions during (or near) the time period

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4. The government subsequently concluded that the amount of each of these transfers – and the amount of each of the alleged April 1998 exchanges of food stamps for cash – was incorrect and that the correct amounts of the transfers were $2,039.48 (October 8, 1998 transfer), $4,438.32 (October 9, 1998 transfer) and $1,581.21 (October 10, 1998 transfer). *See, e.g.* R. 68 (Memorandum In Support Of Government Motion To Strike Surplusage) at 4. The government filed a Motion to Strike Surplusage, requesting leave to correct the amounts of the alleged April 1998 exchanges and the transfers charged as offenses. R. 39 (Government Motion To Strike Surplusage). The Court granted the government's request with respect to the alleged April, 1998 exchanges prior to trial. R.57 (Minute Order granting government Motion to Strike Surplusage in part) and granted the government's request with respect to the charged offenses during trial. Tr. 406-09. Rather than correct the amounts of the charged transfers, the government struck any reference in the Indictment to any amount for the charged transfers. Tr. 409-11.

covered by the Indictment (Tr. 629-638) and argued that, (1) contrary to the Indictment's allegation that the payments to Holyland were the food stamp benefits that Alhalabi wrongly possessed, these alleged in-store transactions were the food stamp benefits at issue and (2) the payment of monies into Holyland's bank account violated the wire fraud statute not because those payments constituted the presentation of food stamps for "payment or redemption" as charged in the Indictment but because those payments provided to Alhalabi the fruits of the fraudulent food stamp transactions that were conducted at Holyland, a wire fraud theory that was not charged in the Indictment. (Tr. 711-15)

At the close of the government's case and again at the close of all of the evidence, Alhalabi moved for a judgment of acquittal. Tr. 672, 681-82, 686-90. On February 4, 2005, the jury returned a verdict of guilty as to all six counts of the Indictment. R. 82 (February 4, 2005 Minute Entry noting jury verdict of guilty as to all six counts); R. 83 (jury verdict as to Alhalabi); Tr. 780-82.

G. Post Trial Proceedings In The District Court

Alhalabi filed a motion challenging his conviction under Fed. R. Crim. P. 29, 33 and 34. R. 90, 91 (Motion by Alhalabi in Arrest of Judgment, for a Judgment of Acquittal or for a New Trial and supporting Memorandum). On April 8, 2005, the district court denied Alhalabi's post-trial motions. Appendix, 19a; R. 98, 99 (Minute Order and Memorandum Opinion and Order denying Alhalabi's post-trial motions). On April 19, 2005, the district court announced final judgment and sentenced Alhalabi to, among other things, 41 months imprisonment, two years of supervised release and payment of $801,000.00 in restitution. R. 101 (Judgment and Sentencing Order). The district court subsequently issued an amended judgment and a second amended judgment. R. 107 (Amended Judgment); R. 110

(Second Amended Judgment). Alhalabi timely appealed from all three judgments. R. 102 (Notice of Appeal); R. 111 (Amended Notice of Appeal).

H. Proceedings In The Court of Appeals

Among other things, Alhalabi argued in the Court of Appeals that, contrary to the Indictment, the electronic funds transfers into Holyland's bank account were neither food stamp transactions nor any of the charged activities therewith. Thus, among Alhalabi's central arguments were that (1) the Indictment stated no offense because payments to retailers such as Holyland are neither food stamp benefits nor any of the activities therewith charged in the Indictment, (2) none of the charges in the Indictment were proved because the government offered neither evidence nor even argument that payments to retailers either were food stamp benefits or any of the charged activities therewith, (3) the jury instructions were flawed because they did not require the government to prove that the payments to Holyland either were food stamp benefits or any of the charged activities therewith and (4) the trial evidence and jury instructions constructively amended the Indictment because the government thereby presented an unindicted, time-barred case, in which (a) the payments to Holyland were just that – payments to Holyland – that violated the wire fraud statute not because they transmitted food stamp benefits for payment or redemption, as charged in the Indictment, but because they transmitted to Holyland (and thus to Alhalabi) the fruits of fraudulent food stamp transactions that occurred in the store (i.e., monies) and (b) the alleged fraudulent food stamp transactions underlying the food stamp fraud charges were actual in-store transactions (primarily those allegedly conducted by four food stamp recipients whom the government called as witnesses at trial), not the payments into Holyland's bank account charged in the Indictment.

On April 11, 2006, the United States Court of Appeals for the Seventh Circuit affirmed Alhalabi's conviction. Appendix, 18a. Among other things, the Seventh Circuit held that the Indictment sufficiently charged wire fraud and food stamp fraud because, in effect, retailer payments are food stamp benefits and are cognizable under 7 U.S.C. § 2024 and that the Indictment was not constructively amended because it could be read to encompass the time-barred, uncharged evidence and charges that the government placed before the jury (i.e., that the payments to Holyland violated the wire fraud statute because they forwarded monies to Alhalabi — not because they presented food stamp benefits for payment or redemption as charged in the Indictment — and that the allegedly fraudulent food stamp transactions were actual, in-store transactions, not the payments to Holyland charged in the Indictment). *United States v. Alhalabi*, 443 F.3d 605 (7th Cir. 2006); Appendix, 1a. Alhalabi's Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied. Appendix, 27a-28a.

REASONS FOR GRANTING THE PETITION

Petitioner Alhalabi respectfully submits that the Seventh Circuit committed two fundamental errors. *First*, the Seventh Circuit in effect held that payments to a retailer participating in the food stamp program constitute food stamp benefits and the charged activities therewith (presentation for payment or redemption and acquisition, transfer and possession). This ruling flies in the face of the laws and regulations governing the food stamp program and stands the food stamp program on its head. *Second*, even as the Seventh Circuit held that retailer payments are food stamp benefits and activities therewith, the Seventh Circuit also interpreted the Indictment to charge, first, that the payments to Holyland violated the wire fraud statute because they transmitted to Alhalabi the fruits of the alleged food stamp fraud scheme (i.e., monies), not because they transmitted food stamps for payment and redemption as the Indictment in fact charged, and, second, that the illegal food stamp transactions at

issue in the food stamp fraud counts were actual, in-store transactions, not payments to Holyland as charged in the Indictment. This ruling — and the Seventh Circuit's corresponding holding that the Indictment was not constructively amended despite a huge gap between the actual language of the Indictment an the trial evidence — cannot be reconciled with *Stirone v. United States*, 361 U.S. 212 (1960), *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991); *United States v. Pigee*, 197 F.3d 897 (7th Cir. 1999); *United States v. Willoughby*, 27 F.3d 263 (7th Cir. 1994) and similar decisions of the Seventh Circuit and other Circuit Courts of Appeal that have required the government to prove the actual charges set forth in the Indictment and not different, unindicted charges. As a result of these two fundamental errors, the Seventh Circuit incorrectly rejected Alhalabi's challenge to the Indictment, the sufficiency of the evidence, the jury instructions and the constructive amendments of the Indictment.

Petitioner Alhalabi, further respectfully submits that the Seventh Circuit therefore has decided an important question of federal law in a way that conflicts with governing statutes and regulations and issued a decision that conflicts with basic precedent of this Court, its own precedent and precedent from other Courts of Appeals on fundamental principles.

I. THE SEVENTH CIRCUIT OPINION FUNDAMENTALLY MISCONSTRUES THE LAWS AND REGULATIONS GOVERNING THE FOOD STAMP PROGRAM

In rejecting Alhalabi's challenge to the validity of the food stamp fraud counts, the Seventh Circuit rejected Alhalabi's contention that retailer payments are neither food stamp benefits nor any of the activities therewith charged in the Indictment:

> Alhalabi claims a distinction between payments into a bank account as a result of food stamp fraud (as included in this indictment) and food stamp coupons (as defined by the statute). . . . The payments are

> simply the end manifestation of the food stamp benefits – the same thing at a later stage. They are part of one seamless transaction, and the indictment charges that transaction. Alhalabi rails against considering these payments as benefits, but he offers no compelling reason to distinguish them. The LINK system simply combines the various elements of the paper system – exchange of the benefits, possession, and redemption – into one. We have no difficulty in concluding that the indictment sufficed under 2024(b).

Appendix, 10a-11a (emphasis added). Alhalabi respectfully submits that this was error.

7 C.F.R. § 271.2, which defines "coupon" (i.e., a food stamp benefit), provides that coupons are "issued pursuant to the provisions of the Food Stamp Act . . . for the purchase of eligible food." 7 C.F.R. § 271.2. It is impossible to reconcile this rule with the Seventh Circuit's conclusion that retailer payments "are simply the end manifestation of food stamp benefits – the same thing at a later stage – part of one seamless transaction. . . ." In fact, the food stamp benefits reflected on a LINK card are completely different – and not a part of, the same as or a different manifestation of – the payments that a retailer receives as reimbursement for providing food in exchange for benefits. To charge one is not to charge the other. If payments to a retailer are food stamp benefits, as the Seventh Circuit in effect held, then under 7 C.F.R. § 271.2 those payments may only be used by retailers for the purchase of eligible food items and not for anything else, such as the purchase of stock, the payment of employees, store upkeep or for distribution as profits. Alhalabi has found no such strictures anywhere. Nor has Alhalabi found any provision requiring a retailer to meet the resource or other requirements that one must meet to obtain Food Stamp assistance; indeed, nothing in the governing regulations even remotely suggests that retailers are Food Stamp recipients.

Compare 7 C.F.R. § 273.8 (resource eligibility standards) and 7 C.F.R. § 278.1 (approval of retail food stores).

This conclusion that retailer payments are not food stamp benefits or activities therewith is confirmed by the fact that the food stamp fraud statute under which the government charged Alhalabi – 7 U.S.C. § 2024 – clearly does not cover retailer payments. Under 7 U.S.C. § 2024(b) a person commits an offense if that person "knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this chapter or the regulations issued pursuant to this chapter . . ." 7 U.S.C. § 2024(b). 7 U.S.C. § 2024(b) thus covers "coupons, authorization cards, or access devices." *Id.* 7 U.S.C. § 2012(b) defines "authorization card" as "the document issued by the State agency to an eligible household which shows the allotment the household is entitled to be issued." 7 U.S.C. § 2012(b). Payments into a retailer's bank account clearly do not fall within this definition. Similarly, 7 U.S.C. § 2012(t) defines "access device" as "any card, plate, code, account number, or other means of access that can be used, alone or in conjunction with another access device, to obtain payments, allotments, benefits, money, goods, or other things of value, or that can be used to initiate a transfer of funds under this Act." 7 U.S.C. § 2012(t). Payments into a retailer's bank account are not "access devices" because "access devices" are used "to obtain payments . . . or other things of value . . . or to initiate a transfer of funds"; access devices are not the funds themselves.

This leaves "coupon," which is defined in 7 U.S.C. § 2012(d) as "any coupon, stamp, type of certificate, authorization card, cash or check issued in lieu of a coupon, or access device, including an electronic benefit transfer card or personnel identification number, issued pursuant to the provisions of this chapter." 7 U.S.C. § 2012(d). The definition of "coupon" set forth in the governing regulations mirrors the

foregoing language and also states, as noted above, that the items that can constitute a coupon must be "issued pursuant to the provisions of the Food Stamp Act . . . for the purchase of eligible food." 7 C.F.R. § 271.2. Payments into a retailer's bank account cannot constitute "cash or check issued in lieu of a coupon." Retailers are not food stamp recipients and thus do not receive coupons from the government and, as shown above, there is no requirement that retailers spend their payments on "eligible food," as there is for coupons issued to a food stamp recipient. Therefore, payments into a retailer's bank account are not made "in lieu of a coupon." *See also* 7 C.F.R. § 272.4(e)(1)(ii) (referring to providing cash "in lieu of coupons" to aid recipients). None of the other language in the definition of "coupon" even references cash or funds and thus none of the other language even arguably covers payments into a retailer's bank account.

7 U.S.C. § 2024(c) likewise does not cover retailer payments. That provision provides that a person commits an offense if that person "presents, or causes to be presented, coupons for payment or redemption . . . knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter . . ." 7 U.S.C. § 2024(c). 7 U.S.C. § 2024(c) thus covers the "present[ation]" of "coupons for payment or redemption." As demonstrated above, the transfer of funds into a retailer's bank account does not fall within the definition of "coupon," thereby placing the funds transfers charged in the Indictment beyond the scope of 7 U.S.C. § 2024(c). Moreover, the definition of "coupon" aside, the transfer of funds into a retailer's bank account does not constitute a "presentation . . . for payment or redemption." Neither "presented" nor "payment" nor "redemption" is defined in Title 7, but the governing regulations make clear that the transfer of funds into a retailer's bank account does not constitute a

"presentation" for either "payment" or "redemption." 7 C.F.R. § 278.2 governs the "participation of retail food stores" in the food stamp program. 7 C.F.R. § 278.2(a), which covers the "use of coupons," makes clear that coupons are "presented" for "payment" when a food stamp recipient uses coupons to pay a retailer for eligible food items: "[c]oupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food." 7 C.F.R. § 278.2(a). Similarly, 7 C.F.R. § 278.2(g), which covers "redeeming coupons," makes clear that coupons are "presented" for "redemption" when a retailer presents coupons to a financial institution or wholesaler, not when the financial institution provides funds in exchange for coupons: "[a]uthorized retail food stores may exchange coupons accepted in accordance with this part for face value upon presentation through the banking system or through a wholesale food concern authorized to accept coupons from that retailer." 7 C.F.R. § 278.2(g). This analysis is confirmed by 7 C.F.R. §§ 278.4(b), (c), which set forth the procedure by which authorized firms redeem coupons and makes clear that the "present[ation]" of "coupons" for "redemption" occurs when a retailer presents properly endorsed coupons and a properly completed redemption certificate to a financial institution or a wholesaler. 7 C.F.R. § 278.4(b), (c). None of these acts is, or can be equated with, a transfer of funds into a retailer's account.[5]

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5. Significantly, the Seventh Circuit opinion did not cite any case that holds that retailer payments are food stamp benefits. The Seventh Circuit's decision is thus *sui generis* and, as demonstrated above, incorrect.

II. THE SEVENTH CIRCUIT OPINION IS AT ODDS WITH *STIRONE* AND ITS PROGENY, THE SEVENTH CIRCUIT'S OWN PRECEDENT AND SIMILAR DECISIONS OF OTHER COURTS OF APPEALS

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." In *Stirone v. United States*, 361 U.S. 212 (1960), this Court held that the Fifth Amendment prohibits trying defendants on charges not approved by a Grand Jury and set forth in an Indictment. The Seventh Circuit and other Courts of Appeal have adhered to this bedrock principle in numerous cases.

In *United States v. Leichtnam*, 948 F.2d 370, 379 (7th Cir. 1991), the Seventh Circuit squarely refused to relieve the government of its error in drafting an Indictment that alleged that the defendant possessed a particular weapon – a Mossberg rifle – when in fact the defendant possessed a pistol and held that the defendant's conviction on the firearm possession charge had to be reversed:

> Obviously, the government could easily have drawn up Leichtnam's indictment to charge him simply with having used or carried "a firearm." But it did not do so, and the description it gave of the gun in the indictment, "to wit a Mossberg rifle, Model 250CA with no serial number," was not merely surplusage. That is true as a matter of law. By the way the government chose to frame Leichtnam's indictment, it made the Mossberg an essential part of the charge and limited the bases for possible conviction to the Mossberg.

Leichtnam, 948 F. 2d at 379.

United States v. Pigee, 197 F.3d 897 (7th Cir. 1999) and *United States v. Willoughby*, 27 F.3d 263 (7th Cir. 1994), also decided by the Seventh Circuit, are in accord. In *Pigee*, Count 7 of the Indictment charged that the defendant "did manage and control a building which she owned, ... and knowingly made that building available for the purpose of storing cocaine and cocaine base . . ." *Pigee*, 197 F.3d at 887 n.5. The Seventh Circuit reversed the defendant's conviction on Count 7 because the trial court constructively amended the Indictment by instructing the jury that "the government must prove that [defendant] made the building . . . 'available for the purpose of unlawfully manufacturing, storing, distributing, or using cocaine or cocaine base' . . . and the government introduced some evidence at trial that the defendants distributed cocaine at [the building] even though 'distributing' was not charged in Count 7." *Id.* (". . . we have no way of knowing whether [defendant] was actually convicted under the 'storing' prong of the instruction as it appeared in Count 7 of the indictment, or if the jury found her guilty under the manufacturing, using or distributing prongs, none of which appeared in the indictment."). *Id.* Similarly, in *Willoughby*, the Court reversed defendant's conviction for use of a firearm in the course of a drug trafficking offense because the Indictment specified that the particular offense in which the firearm was used was "distribution of cocaine" when in fact there was no evidence defendant distributed cocaine, only that he possessed cocaine with intent to distribute. *Willoughby*, 27 F.3d at 266-67 (". . . the weapons conviction could only have been based upon a possession-protection theory, a valid ground in this circuit but not when it falls outside the scope of the [I]ndictment. Willoughby's motion for judgment of acquittal should have been granted . . .")

Decisions of other Courts of Appeals are in accord with the foregoing decisions and squarely conflict with the decision of the Seventh Circuit in this case. *See, e.g., United States v.*

Weissman, 899 F.2d 1111, 1114-15 (11th Cir. 1990) (identification of particular enterprise in RICO indictment ("DeCalvalcante family of LaCosa Nostra") was not surplusage); *United States v. Adams*, 778 F.2d 1117, 1118-19 (5th Cir. 1985) (reversing conviction for constructive amendment where Indictment alleged identification had false name and trial evidence and jury instructions referenced both false name and false address in identification); *Howard v. Dagget*, 526 F.2d 1388 (9th Cir. 1975) (if an indictment charges a defendant with inducing two particular women, named in the indictment, to engage in prostitution, the identities of those two women are not surplusage).

Alhalabi respectfully submits that the Seventh Circuit's opinion in this case cannot be squared with the foregoing decisions. At times, the Seventh Circuit opinion interprets the Indictment to set forth wire fraud charges that the retailer payments furthered the alleged scheme by forwarding to Petitioner Alhalabi monies that were the fruits of food stamp fraud, which is fundamentally different from the Indictment's stated wire fraud charge that Petitioner Alhalabi furthered the scheme by transmitting food stamp benefits for payment or redemption. Thus, in rejecting Petitioner Alhalabi's challenge to the validity of the wire fraud counts, the Seventh Circuit opinion states:

> . . . the allegations in the [I]ndictment set forth all ... elements [of wire fraud], explaining the fraudulent scheme and describing wires that brought Alhalabi his final ill-gotten gains.

Appendix, 10a. Similarly, in rejecting Alhalabi's argument that the Indictment had been constructively amended by the introduction of evidence of retailer payments that in fact were retailer payments, not food stamp benefits, the Seventh Circuit opinion states:

> . . . each count properly charged one transaction, not multiple transactions, in which Alhalabi possessed the electronic coupon benefits and which resulted in the payment of money into the bank account.

Appendix, 16a-17a. The foregoing would constitute a proper reading of the Indictment if the wire fraud counts in fact had charged that Petitioner Alhalabi furthered the scheme by causing *monies* to be transferred to Holyland's account. But they did not. Instead, they charged that Alhalabi furthered the scheme by "knowingly caus[ing] to be transmitted for payment and redemption . . . food stamp benefits." Indictment, Count I, ¶ 11, Counts 2-3.

Nor can the Seventh Circuit's reading of the food stamp fraud counts be reconciled with *Leichtnam*, *Pigee*, *Willoughby* and the similar cases cited above from other Courts of Appeals. In rejecting Petitioner Alhalabi's challenge to the food stamp fraud counts, the Seventh Circuit read the language of the food stamp fraud counts in the conjunctive to allege that Petitioner Alhalabi both "acquired, transferred and possessed food stamp benefits" and caused a payment to be made to Holyland's bank account: ". . . the [I]ndictment states that Alhalabi 'did knowingly acquire, transfer and possess . . . LINK benefits . . . [*and that*] he knowingly and unlawfully caused an electronic payment' . . . into his bank account." PO at 10 (emphasis added). But the food stamp fraud counts are not written in the conjunctive. They clearly charge that the benefits that Petitioner Alhalabi wrongly acquired, transferred and possessed are payments into Holyland's bank account: "did knowingly acquire, transfer and possess . . . LINK benefits . . . *in that* he knowingly caused an electronic payment to be made to Firstar Bank . . ." Indictment, Counts 4, 5, 6 (emphasis added).

In sum, the Seventh Circuit has construed the Indictment in this case with a flexibility that is lacking in – and clearly in

conflict with – *Stirone*, *Leichtnam*, *Pigee* and *Willoughby* and the decisions of the other Courts of Appeals cited above, where the government was held strictly to the language of the Indictment that it obtained. Moreover, the Seventh Circuit, as described above and again in conflict with the foregoing authorities, overlooked a huge gap between the actual language of the Indictment and the trial evidence and charges.

Indeed, in contrast to *Leichtnam*, where the evidence clearly established that the defendant had been in possession of a firearm, albeit not the Mossberg rifle charged in the Indictment, there is very real doubt that the government could have obtained an Indictment in this case if it had submitted to the grand jury an Indictment setting forth the charges that the Seventh Circuit has construed the actual Indictment to state. When the government obtained the Indictment, there was less than 48 hours left before the running of the statute of limitations on all LINK card activity at Holyland and the government knew of no particular illegal LINK card transactions at Holyland that occurred within the remaining limitations period. If the government had drafted an Indictment that set forth charges in the fashion described in the Seventh Circuit opinion, the government would have had to describe particular food stamp transactions that occurred within the limitations period. The grand jurors might have asked, if presented with an Indictment that charged that Alhalabi had violated the wire fraud statute by causing a transmission of monies to his bank account, exactly what proof the government had of actual, in-store LINK fraud within the limitations period such as to render the payments to Holyland violative of the wire fraud statute. By presenting an Indictment that charged the payments to Holyland as if they were food stamp benefits and activities therewith, the government avoided this dilemma. But the government should not now be allowed to escape the other half of that bargain, the return of an Indictment that stated no offense and the charges of

which could never be proved. To do so flatly and inescapably conflicts with *Stirone Leichtnam*, *Pigee*, *Willoughby* and similar decisions of other Courts of Appeals.

CONCLUSION

For the reasons set forth above, petitioner Abdul Karim Alhalabi respectfully requests that this Court grant certiorari, reverse the decision of the United States Court of Appeals for the Seventh Circuit and order this case remanded to the district court for a new trial.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED APRIL 11, 2006

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-2209 & 05-2591

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABDUL KARIM ALHALABI,

Defendant-Appellant.

Argued Nov. 29, 2005.
Decided April 11, 2006.

Before MANION, WILLIAMS, and SYKES, Circuit Judges.

MANION, *Circuit Judge.* Abdul Alhalabi owned a grocery store in Chicago. Most of the store's income came from transactions with customers using food stamps. The government started investigating Alhalabi after his store reported unusually large food stamp benefit redemptions. Through its efforts, the government determined that Alhalabi was illegally paying his customers cash for their benefits in an amount well below their face value. The government revoked Alhalabi's participation in the food stamp program

but did not bring charges for wire and food stamp fraud until nearly five years later. After a five-day trial, a jury convicted Alhalabi on three counts of wire fraud and three counts of food stamp fraud, and he was sentenced to forty-one months' imprisonment. Alhalabi appeals his conviction. We affirm.

I.

Holyland Foods, Inc. ("Holyland"), a Chicago grocery store owned by Abdul Alhalabi, began participating in the federal food stamp program in 1993. While the United States Department of Agriculture ("USDA") provides food stamp benefits, the Illinois Department of Human Services administers the program in Illinois. The food stamp program allows eligible recipients to use vouchers to buy certain types of staple food, such as grains, meat, dairy, and poultry, from authorized stores. The owners of authorized stores must go through an application process and training, during which they learn that they are forbidden from trading food stamps for cash. After training, the USDA sends an investigator to conduct an inspection of the store and then decides whether to authorize that store.

Holyland's applications to the USDA detailed Holyland's operation. In the initial 1993 application, Alhalabi, identified as the president of Holyland, stated that the store had one cash register and no optical scanners. The application further stated that the store was stocked with household supplies and a range of foods including breads, dairy, fresh produce, poultry, fish, meat, and eggs. He estimated that Holyland would have annual gross sales of $240,000 and that approximately $190,000 of this amount would come from

food sales. After a store inspection, Holyland received its authorization in November 1993.

In 1996, Alhalabi applied for reauthorization of Holyland's participation in the program. Alhalabi still listed himself as the president, though the gross sales (for the 1995 tax year) had increased to $367,000, with eligible food sales accounting for $300,000 of the total. Alhalabi indicated that in 1995 Holyland had accepted $280,000 worth of food stamps. Holyland was reauthorized in December 1996.

In 1997, the food stamp program in Illinois underwent a major change, replacing the existing regime in which paper food stamp coupons were used to obtain food. In its place, Illinois adopted an electronic system in which each person eligible for food stamp benefits had an individual account to which benefits were added once a month. The electronic system, which was named the LINK system, made use of a plastic card (the "LINK card"), similar to an ATM card, which was swiped at a point of sale device (the "POS") in an authorized store. The food stamp recipient would then enter a PIN code, and the amount of the sale would be deducted from his account balance. The LINK card also could be used to obtain cash if the card owner participated in the Illinois cash assistance program, which is not related to food stamps. Because this appeal centers on the technicalities of the LINK system and how it relates to the elements of the crime, a detailed description of the operation is helpful.

After a recipient used his LINK card, a retailer received payment through an entirely automated process. For the years 1997 and 1998, Illinois contracted with a company named

Appendix A

Transactive, based in Austin, Texas, to administer these payments to retailers. Transactive, in turn, used services provided by National City Bank in this operation. National City offered a type of electronic funds transfer, the automated clearing house ("ACH") program. This computer program compiled the daily LINK card transactions at Transactive, and sent the data to National City, which automatically transmitted payment to the appropriate retailer bank accounts using the Federal Reserve system.

Examining the ACH process in greater detail, the program involved Transactive computers automatically bundling all the information received from Illinois LINK card transactions into an ACH file. The ACH file was created on a daily basis (at 2 p.m.) and included the amounts of all LINK transactions in Illinois for each authorized location's preceding business day. As Transactive received all LINK transactions, the file could contain amounts of both food stamp transactions and Illinois cash assistance. The file also included the bank information for both Transactive and the authorized retailers that were to receive payment. Once the ACH file had been created for a day, Transactive's computers automatically transmitted the information to its concentrator bank, National City, which was located in Kalamazoo, Michigan.

The ACH file received by National City contained information on multiple retailers-whichever stores had LINK transactions during their preceding business day. National City's ACH computer program then sorted the retailers into those which had bank accounts with National City and those that did not. For those with bank accounts outside National

City, the ACH program transmitted payments to each retailer according to the dictates of the National Automated Clearinghouse Association. Basically, this meant that the ACH program forwarded each store's account information to the Federal Reserve computer system, which automatically determined the tracking/ routing number of the retailer's bank account and then sent the transaction information to the retailer's bank. The end result was that the retailer's bank posted the amount of the transaction. In other words, the retailer was paid. This process utilized no human interaction after the swipe of the LINK card and the entering of the PIN number, relying instead on computers for the interstate routing and transmission of funds.[1] In other words, once the LINK card was swiped at the site of the retail transaction, it set off a chain reaction of the events described above that ended with a deposit in the retailer's bank account.

Holyland, like other participating Illinois stores, switched from paper food stamps to the LINK system in 1997. Holyland's annual food stamp redemptions in the three years prior to this change were relatively constant: $137,723 in 1994; $201,457 in 1995; and $216,181 in 1996. The food stamp redemptions jumped significantly, however, once Illinois made the switch to the LINK system. In 1997, Holyland redeemed a total of $1,028,015 in food stamp benefits. Beginning in May of that year, the monthly food stamp redemptions shot up from $22,285 to approximately $184,000 in October. The pattern of increased activity continued unabated in 1998, during which time Holyland

1. Transactive theoretically could have stopped a retailer payment by calling National City before the file was transmitted to the Federal Reserve.

accepted a total of $1,032,778.26 through the first half of October. The LINK card transaction records from Holyland reflect that, during 1997 and 1998, Holyland repeatedly processed multiple, large food stamp transactions within mere seconds of each other despite its lack of multiple cash registers or optical scanners.

The jump in redemptions at Holyland did not pass unnoticed. The government suspected that Holyland was trading cash for benefits. As mentioned previously, trading food stamp benefits for cash is illegal, but the incentive to cheat is high for both a store owner and a food stamp recipient. In a typical trade, the food stamp recipient accepts cash, albeit a discounted amount, in exchange for the ability to spend the proceeds without restriction. For example, a store owner might agree to give a recipient $50 cash for $100 in benefits. This gives the recipient cash to use on anything (instead of staple foods), while the store owner gets reimbursed from the government for significantly more than his actual outlay.

Acting on its suspicions, the government began an investigation, sending in multiple undercover agents to try to exchange food stamp benefits for cash. The first undercover agent posed as a welfare recipient in March 1998, but the cashier at Holyland refused to trade cash for benefits. This reluctance was short-lived, as a Holyland cashier began trading cash for benefits with a second undercover agent, Mireille Swain, in April. Swain received $80 cash for $125 in benefits on April 3 and $100 cash for $150 in benefits on April 8, as well as conducting other trades later that month. The investigation eventually culminated in the government's

removal of Holyland's POS device on October 10, 1998. Alhalabi claimed that the increase in food stamp redemptions was the result of high meat sales from Holyland's meat counter and the closing of a nearby supermarket.

After the seizure of Holyland's POS device, the government left the case dormant for nearly five years. On October 8, 2003, the grand jury returned a six-count wire fraud and food stamp fraud indictment relating to payments to Alhalabi from October 8 to October 10, 1998, charging violations of 18 U.S.C. § 1343 and 7 U.S.C. § 2024(b). Before and during trial, Alhalabi argued that the conduct charged in the indictment, which referenced the bank payments he received and not the swipes of the LINK cards, could not constitute food stamp or wire fraud under the language of each of the relevant statutes.[2] The district court at first reserved ruling on this issue.

At trial, the government called a number of witnesses, including Special Agent Swain, as well as a former employee who had traded cash for benefits, and various food stamp recipients who had traded benefits for cash. The government also introduced testimony from representatives of the USDA, Transactive, and National City, who explained how the ACH computer program worked from card swipe to final payment.

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2. Alhalabi's argument was rooted in the fact that the government did not charge the actual swipes of the LINK card in the indictment. These swipes, as noted before, occurred on October 7-9, 1998. Had the government charged the swipes, it likely would have violated the five-year statute of limitations, at least regarding the October 7 swipe, as the grand jury did not return the indictment until October 8, 2003.

After hearing from such representatives, the district court found that the indictment was sufficient. The jury convicted Alhalabi on all six counts, and he was sentenced to forty-one months in prison.

II.

Alhalabi pursues challenges to his conviction in scattershot fashion. First, Alhalabi renews his contention that the indictment fails to charge any offenses. Alhalabi argues that the bank payments referenced in the indictment do not suffice to show food stamp fraud as defined by the food stamp statute. He further contends that the wire fraud counts in the indictment are insufficient. Building off of this theory, Alhalabi asserts that the jury instructions regarding the various counts, as well as the eventual verdict, were fundamentally flawed because of these defects. Next, Alhalabi argues that the district court erred by granting the government's motion to strike surplusage on the wire fraud counts. Alhalabi also suggests that the district court constructively amended the indictment through a number of its actions, including the admission of evidence of some LINK transactions from outside the period of the indictment and the motion to strike surplusage. Finally, he claims that the district court erred in admitting (and denying his motion to strike) certain evidence of fraudulent LINK transactions outside the period charged in the indictment.

Appendix A

A.

1.

As an initial point, Alhalabi opposes the indictment on the grounds that it failed to properly charge either wire or food stamp fraud. We review a district court's denial of a motion to dismiss an indictment de novo. *See United States v. Wilson*, 437 F.3d 616, 619 (7th Cir.2006). While an indictment must allege the elements of an offense to be valid, it is not necessary to spell out each element if each is present in context. *See United States v. Westmoreland*, 240 F.3d 618, 633 (7th Cir.2001). "The test for determining the sufficiency of the indictment is whether the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial." *Id.* (quoting *United States v. Garcia-Geronimo*, 663 F.2d 738, 743 (7th Cir.1981)).

We first address Alhalabi's belief that the indictment failed to charge wire fraud. Alhalabi did not develop this argument in his initial brief before this court, raising it in a meaningful way only in his reply brief, so it is waived. *See Harper v. Vigilant Ins. Co.*, 433 F.3d 521, 528 (7th Cir.2005) ("The argument is more developed in [the] reply brief, but this is too little, too late, for 'arguments raised for the first time in a reply brief are [also] waived.' "); *see also United States v. Williams*, 436 F.3d 767, 769 (7th Cir.2006); *United States v. Stevens*, 380 F.3d 1021, 1024-25 (7th Cir.2004). Even if this argument were not waived, Alhalabi's theory would still fail. "To secure an indictment for mail or wire fraud, the government was required to show probable

cause to believe that the defendant: (i) participated in a scheme to defraud; (ii) acted with intent to defraud; and (iii) used the mail or wires in furtherance of the fraudulent scheme." *United States v. Vincent*, 416 F.3d 593, 600 (7th Cir.2005); 18 U.S.C. § 1343. Here, the allegations in the indictment set forth all three elements, explaining the fraudulent scheme and describing wires that brought Alhalabi his final ill-gotten gains. The district court correctly denied Alhalabi's motion to dismiss the indictment on the mail fraud counts.

Moving to Alhalabi's challenge to the food stamp fraud counts, Alhalabi relies on a narrow reading of the food stamp statute, which provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this chapter" is guilty of a felony. 7 U.S.C. § 2024(b). Although we have in the past used this section to punish store owners who, like Alhalabi, traded cash for paper coupons, *see United States v. Barnes*, 117 F.3d 328 (7th Cir.1997), Alhalabi claims a distinction between payments into a bank account as a result of food stamp fraud (as included in this indictment) and food stamp coupons (as defined by the statute). Alhalabi contends that the food stamp statute does not punish what was charged in this indictment. As in the trial court, Alhalabi argues that a swipe is all that is needed for food stamp fraud under the LINK system. Under this reading, the statute of limitations would disqualify the charges arising from the October 7 swipe.

Alhalabi's argument, however, lands wide of the mark. The food stamp statute punishes the transfer and acquisition

of food stamp benefits, casting a broad net to include as coupons both "electronic benefit transfer card[s]" as well as "cash or check issued in lieu of a coupon." 7 U.S.C. § 2012(d). For each of three dates, the indictment states that Alhalabi "did knowingly acquire, transfer, and possess United States Department of Agriculture Electronic Transfer Card benefits, namely LINK benefits having a value more than $100, . . . [and that] he knowingly and unlawfully caused an electronic payment of [the relevant amount for that date]" into his bank account. The payments are simply the end manifestation of the food stamp benefits-the same thing at a later stage. They are part of one seamless transaction, and the indictment charges that transaction. Alhalabi rails against considering these payments as benefits, but he offers no compelling reason to distinguish them. The LINK system simply combines the various elements of the paper system — exchange of the benefits, possession, and redemption — into one. We have no difficulty in concluding that the indictment sufficed under 2024(b).[3]

2.

Piggybacking off of this argument, Alhalabi challenges the district court's jury instructions relating to the food stamp

3. While we reject Alhalabi's argument, the government could have avoided any issues had it not flirted dangerously close to the limitations deadline. This led to an awkward indictment that failed to charge the most conceptually accessible part of the transaction-when Holyland employees swiped the LINK cards and traded cash for the benefits. The cardholder got immediate cash, while the store owner had to wait. But the swipe set in motion a process that did not end until the money was in the bank. The government could charge at any point from swipe to deposit under the statute.

fraud counts.[4] We review jury instructions de novo to determine whether they provide fair and accurate summaries of the law. *See United States v. Stewart*, 411 F.3d 825, 827 (7th Cir.2005); *United States v. Tingle*, 183 F.3d 719, 729 (7th Cir.1999). "Looking at the charge as a whole, we must determine whether the instruction misled the jury concerning the issues or its duty in relation to those issues." *See Tingle*, 183 F.3d at 729.

In relevant part, the district court instructed the jury that to convict Alhalabi, it had to find: "First, that the defendant knowingly acquired Link [sic] card benefits in a manner contrary to law and, second, that the amount acquired exceed $100. . . . Under the law, Link [sic] card benefits may only be exchanged for eligible food and may not be exchanged for cash." As in his argument regarding the indictment, Alhalabi faults the district court for not distinguishing the bank payments from paper food stamp coupons. The district court, however, was correct to treat them as one transaction. The district offered an accurate summary of the law and properly directed the jury in its consideration of the issues.

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4. Alhalabi mentions that the "wire fraud instructions were similarly erroneous" in his initial brief without any further argument. It is difficult to understand precisely what this cryptic reference means, given the vast difference between the elements of wire and food stamp fraud. Without necessary elaboration, this argument is waived. Even if it were not waived, the district court accurately instructed the members of the jury on what they needed to find for wire and food stamp fraud.

3.

Alhalabi also contends that the district court erred in its denial of his motion for acquittal after the jury verdict on both the wire and food stamp fraud counts.[5] We review such a denial de novo, asking "whether the evidence presented, when viewed in the light most favorable to the government, could support any rational trier of fact's finding of all the essential elements of the crime beyond a reasonable doubt." *United States v. Brown*, 328 F.3d 352, 355 (7th Cir.2003). We will reverse only if the record is devoid of evidence from which a jury could conclude guilt beyond a reasonable doubt. *See id.*

This challenge comprises the third in Alhalabi's trilogy of objections to the charged conduct. In this recitation, he argues that, as the bank payment wires that were charged did not constitute illegal offenses, the jury could not have properly convicted him. Alhalabi again is mistaken; the government put forward sufficient evidence on both the wire and food stamp fraud counts to secure a conviction. A Holyland employee testified that he traded cash for benefits from the LINK card and food stamp recipients confirmed that Holyland paid them for such benefits. The government introduced testimony from the USDA, Transactive, and National City to explain how the swipe of the LINK card automatically results in the transfer of benefits to a retailer file and eventually payment into a retailer's bank account.

5. Alhalabi also raises a sufficiency of the evidence challenge to the verdicts. As the later challenge proceeds along precisely the same track as his challenge to the denial of the motion for acquittal, we need not address it separately.

Appendix A

Confirming the testimony of the Transactive employee, the government introduced evidence of both the relevant LINK card swipes and the eventual payment into Alhalabi's account of the amounts of the food stamp benefits. The jury had reasonable evidence from which it could conclude that Alhalabi was guilty beyond a reasonable doubt on each count.

B.

Next, Alhalabi argues that the district court erred in granting the government's motion to strike the various amounts referenced in the food stamp fraud counts. An amendment or change to an indictment will be "allowed to stand if it does not change an 'essential' or 'material' element of the charge so as to cause prejudice to the defendant." *United States v. Cina*, 699 F.2d 853, 857 (7th Cir.1983). A material element of the crime is one whose specification with precise accuracy is necessary to establish the illegality of the behavior and the court's jurisdiction. *See id.*; *see also United States v. Clark*, 943 F.2d 775, 783 (7th Cir.1991); *United States v. Muhammad*, 928 F.2d 1461, 1470 (7th Cir.1991).

The exact amounts of the payments were not material elements of the charges. The government charged Alhalabi with fraudulently obtaining food stamp benefits, which resulted in the automatic payment into his bank account of certain sums several days later. The exact sums listed in the indictment were not necessary to these charges. What mattered was that he illegally possessed food stamp benefits (for which he received payment), not the inner workings of the payment system. Alhalabi does not contend that these

wires reimbursed him for something other than the swipes of the LINK cards several days earlier or were less than one hundred dollars. His challenge on this ground, therefore, fails.

C.

Alhalabi further asserts that several of the district court's actions amounted to a constructive amendment of the indictment. Combining several of his prior arguments, Alhalabi finds fault in: (1) the presentation of evidence about wires not charged in the indictment; (2) testimony about uncharged food stamp fraud; (3) the introduction of the payments into his bank account, which he contends could not be considered food stamp benefits; and (4) improper jury instructions. We review whether a district court constructively amended the indictment de novo. *United States v. Trennell*, 290 F.3d 881, 886 (7th Cir.2002); *see also United States v. Pigee*, 197 F.3d 879, 885 (7th Cir.1999). "Constructive amendment of the indictment can occur 'when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury.' " *United States v. Jones*, 418 F.3d 726, 729 (7th Cir.2005) (quoting *United States v. Cusimano*, 148 F.3d 824, 829 (7th Cir.1998)). Constructive amendments are forbidden as they violate the guarantees of the Fifth Amendment. *See United States v. Murphy*, 406 F.3d 857, 860 (7th Cir.2005).

No constructive amendment occurred in this case. We briefly address each of Alhalabi's contentions, three of which we have already rejected and all of which we reject in this

context. First, the government's presentation of wires not expressly mentioned before the grand jury did not affect the scope of the indictment. At trial, the government offered evidence about fraudulent food stamp transactions that directly resulted in payment to Alhalabi's bank account. The government simply supplied more technical details that easily fit with the allegations in the indictment. The introduction of the complete ACH system did not contradict or change in any substantive way what had been presented to the grand jury, and thus, was not a constructive amendment. *See Trennell*, 290 F.3d at 888.

Second, Alhalabi argues that the entry of evidence of conduct occurring prior to the crimes charged amended the indictment by allowing the jury to convict for uncharged acts, in particular the LINK swipes of October 7-9. The admission of evidence intricately related to the charged crimes (the remaining parts of the LINK system) does not constructively amend the indictment. *See, e.g., United States v. Johnson*, 248 F.3d 655, 665 (7th Cir.2001); *Cusimano*, 148 F.3d at 829. Here, the government presented evidence intricately related to the crimes charged to paint for the jury the complete picture of the scheme and Alhalabi's actions. This did not alter the crimes from the ones described in the indictment.

Third, Alhalabi contends that the payments into his bank account that were charged in the indictment did not constitute any crime and, therefore, the indictment must have been *de facto* amended to support the verdict. As explained before, each count properly charged one transaction, not multiple transactions, in which Alhalabi possessed the electronic coupon benefits and which resulted in the payment of money

into the bank account. This fully stated the crimes of food stamp fraud and wire fraud.

Fourth, Alhalabi asserted that, by omitting his narrow reading of food stamp benefits, the district court crafted improper jury instructions. However, the district court properly viewed this as a seamless transaction and delivered instructions that properly summarized the law. No error occurred.

D.

Finally, we examine Alhalabi's claim that the district court erroneously admitted evidence of prior food stamp fraud outside the charged time period. Alhalabi filed both a motion in limine and a motion to strike such evidence, both of which the district court denied. Before this court, Alhalabi suggests that these rulings contravened *Federal Rule of Evidence 403*, as the unfair prejudicial impact outweighed the evidence's probative value. We review the district court's denials for an abuse of discretion. *See United States v. Griffin*, 194 F.3d 808, 822 (7th Cir.1999) (denial of motion in limine); *United States v. Bucey*, 876 F.2d 1297, 1314-15 (7th Cir.1989) (denial of motion to strike surplusage).

The district court acted properly. In the present case, the government introduced evidence of a long-running scheme by Holyland Foods to abuse the LINK card system by trading cash for benefits. The evidence explained, from the perspective of a store employee, food stamp program recipients, and undercover investigators, the ins and outs of this fraud. This evidence had extremely high probative value.

Looking at the other side of the Rule 403 ledger, there is nothing about this evidence that bears the hallmarks of unfair prejudice. *See United States v. Connelly*, 874 F.2d 412, 418 (7th Cir.1989) ("Evidence is considered unfairly prejudicial, not merely because it damages the opposing party's case, but its admission makes it likely that the jury will be induced to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented on the crime charged.") (internal citations omitted). Alhalabi failed, in both his briefs and at oral argument, to introduce any compelling reason that would suggest the jury would be confused or "incited" to decide this case on an improper basis. We conclude, therefore, that the district court did not abuse its discretion when denying Alhalabi's various motions opposing the admission of this evidence.

III.

Alhalabi engaged in food stamp and wire fraud on the dates alleged in the indictment, October 8-10, 1998. The indictment crafted by the government, while not ideal, was sufficient. The district court properly ruled on the various challenges to the indictment and evidentiary issues, and we, therefore, Affirm.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED APRIL 8, 2005

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 03 CR 971 - 1

UNITED STATES OF AMERICA

vs.

ABDUL KARIM ALHALABI

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Abdul Karim Alhalabi was convicted by a jury of three wire fraud charges and three food stamp trafficking charges. He has moved for an order arresting judgment on the grounds that the indictment failed to charge an offense; for a judgment of acquittal; or for a new trial.

1. Whether the indictment charged an offense

The Court rejects Alhalabi's argument that the wire fraud charges (Counts 1, 2, and 3) failed to charge an offense. These counts' charging paragraphs alleged that Alhalabi, for the purpose of executing a scheme to defraud, knowingly caused food stamp benefits to be transmitted for payment and

redemption by wire communication in interstate commerce, specifically, certain identified electronic funds transfers. *See, e.g.*, Indictment, Count 1 ¶ 11. These allegations met the requirements of the wire fraud statute. 18 U.S.C. § 1343. Alhalabi's argument that the identified electronics funds transfers were not truly payments or redemptions of food stamp benefits is an argument about the sufficiency of the evidence, not the adequacy of the indictment.

Alhalabi's argument regarding the food stamp charges has some surface appeal but also fails. Counts 4, 5, and 6 alleged that Alhalabi had violated 7 U.S.C. § 2024(b) & (c). These are two distinct offenses, and for this reason the charges were arguably duplicitous. *See, e.g., United States v. Buchmeier*, 255 F.3d 415, 421 (7th Cir. 2001) (duplicity consists of the joining of two charges in a single count). But Alhalabi did not argue before trial, and does not argue now, that these particular charges were duplicitous. In any event, any potential prejudice from the duplicitousness of these charges was cured by the jury instructions, which effectively limited the jury to consideration of a charge under § 2024(b). *See* Instructions Given to the Jury at 26 (requiring the government to prove that Alhalabi "knowingly acquired Link card benefits in a manner contrary to law"). *See Buchmeier*, 255 F.3d at 425 (duplicitous indictment cured by jury instructions that required jury to convict defendant of a single offense); *United States v. Cherif*, 943 F.2d 692, 701 (7th Cir. 1991).

Section 2024(b) prohibits the knowing use, transfer, acquisition, alteration, or possession of "coupons, authorization cards, or access devices in any manner not

authorized by this chapter or the regulations issued pursuant to this chapter." An "access device" is a "card, plate, code, account number, or other means of access that can be used, along or in conjunction with another access device, to obtain payments, allotments, benefits, money, goods, or other things of value, or that can be used to initiate a transfer of funds" under the Food Stamp Act. 7 U.S.C. § 2012(t).

Counts 4, 5, and 6 each alleged that Alhalabi "did knowingly acquire, transfer, and possess United States Department of Agriculture Electronic Transfer Card benefits, namely LINK benefits," in that he caused payments to be made to his company's bank account, knowing the LINK benefits to have been received, transferred, and used in an unauthorized manner. *See, e.g.*, Indictment, Count 4 ¶ 2. Alhalabi contends that payments into a bank account are not "coupons, authorization cards, or access devices" and that these Counts thus fail to charge an offense.

The Court again concludes that Alhalabi's argument is an argument about the sufficiency of the evidence, not the sufficiency of the indictment. An indictment charges an offense if it alleges the elements of the offense, *see, e.g.*, *United States v. Sandoval*, 347 F.3d 627, 633 (7th Cir. 2003); whether the proof measures up is a separate matter. The indictment's allegation that Alhalabi knowingly acquired, transferred, and possessed electronic transfer card benefits, though perhaps not as precise as one might want to see in an indictment, was sufficient to state an offense under § 2024(b), as Alhalabi's acquisition, transfer, and possession of electronic transfer card benefits may be said to be an unauthorized use, acquisition, transfer, and possession of an

"access device" — i.e., a LINK card. It may also be said to be an unauthorized use, acquisition, transfer, and possession of a "coupon," defined in the Food Stamp Act as including both "authorization card[s]" and "access device[s], including . . . electronic benefit transfer card[s]." 7 U.S.C. § 2012(d).

2. Whether the evidence was sufficient

In deciding a motion for judgment of acquittal, the Court must view the evidence in the light most favorable to the government, *see, e.g., United States v. Arocho*, 305 F.3d 627, 639 (7th Cir. 2002), and may grant the motion only if no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *See, e.g., Untied States v. Griffin*, 310 F.3d 1017, 1022 (7th Cir. 2002). The evidence was sufficient to permit the jury to convict Alhalabi of each of the charges.

Alhalabi's primary argument for a judgment of acquittal on the wire fraud charges is a reprise of an argument that the Court rejected during the course of the trial, specifically, that the government failed to prove the particular wire communications alleged in Counts 1 through 3. These Counts each identified an electronic funds transfer from Austin, Texas to Firstar Bank in Chicago for deposit into Holyland Foods' account. *See, e.g.*, Indictment, Count 1 ¶ 11. Alhalabi contends that the evidence shows that the only wire communications transmitted from Austin were automated clearing house files that were sent not to Firstar Bank in Chicago but rather to National City Bank in Kalamazoo, Michigan, which stripped out entries for retailers with accounts at that Bank and then forwarded the files by wire to

a Federal Reserve Bank, which in turn forwarded the transmission to the various banks where funds were to be deposited, including Firstar. According to Alhalabi, there was no wire transfer from Austin to Chicago; the wire sent by National City was a different wire communication than the one sent from Austin; and the wire from Austin was not itself an electronic funds transfer but rather was a request to make such a transfer.

As the government argues, however, the evidence was sufficient to show that Alhalabi caused Transactive Corporation to send a wire from Austin directing the making of an electronic funds transfer into Holyland's account in Chicago. It is of no consequence that the wire communication did not go directly from Austin to Chicago. *See United States v. Van Cauwenberghe*, 827 F.2d 424, 430 (9th Cir. 1987). The wire communication, considered as a whole, began in Austin and ended at Firstar Bank, and any arguable variance resulting from the fact that there were intermediate steps in no way prejudiced Alhalabi. *See, e.g., United States v. Martino*, 648 F.2d 367, 398 (5th Cir. 1981). In addition, the fact that Transactive's wire communication was not itself a transfer of funds, but rather a direction to make a transfer, is likewise immaterial. This is not a case in which there is a danger that the jury convicted Alhalabi on some different charge that the grand jury returned or a set of material allegations different from the one that the grand jury considered.

The Court also rejects Alhalabi's remaining arguments. First, there was sufficient evidence that Alhalabi participated in a scheme to defraud as late as October 1998, even after he

purportedly sold the store (a claim which, we might add, the jury was not required to accept). Among other things, there was evidence that Alhalabi continued to participate in the operation of the store through October 1998. The jury reasonably could conclude from this that he continued to participate during that period in the scheme he had begun to conduct some time earlier. Whether Alhalabi was the person who actually swiped the cards of the recipients who traded benefits for cash on the referenced dates is beside the point.

Second, there was sufficient evidence to show that fraudulent LINK card transactions took place at Holyland on October 7 and 8, 1998, as alleged in Counts 1, 2, 4, and 5. The government presented the testimony of witnesses whose LINK cards were used on those dates. Though Alhalabi had ample ammunition with which to attack their credibility, the jury was entitled to believe their testimony.

Third, there was sufficient evidence that fraudulent LINK card transactions took place on October 9, 1998, as alleged in Counts 3 and 6. Although the cards of the testifying recipients may not have been used on that date, other evidence, including among other things the huge disparity between Holyland's food purchases and its LINK card transactions, and the arguable falsity of the explanations given by Alhalabi when interviewed by law enforcement, was sufficient to permit the jury reasonably to infer that unauthorized transactions had taken place on that date as they did on earlier dates.

Finally, the evidence was sufficient to show that the electronic funds transfers into Holyland's bank account

constituted LINK benefits and/or electronic benefit transfer food stamp benefits. The wire communications, as described earlier, involved directions from Transactive Corporation to transfer funds into Holyland's account, and funds were in fact transferred to Holyland's account pursuant to those directions. The amounts of the transfers consisted of the amounts of LINK card / food stamp benefits that had been redeemed at Holyland. Alhalabi seems to suggest that the problem is that the funds transferred were not themselves food stamp benefits. That is a distinction without a difference. Section 2024(b) covers both recipients who present coupons or LINK cards in return for cash and retailers and others who give cash in return for coupons or LINK cards without authorization.

3. Whether a new trial should be ordered

Alhalabi's request for a new trial is based on two issues: the Court's denial of his motion to strike surplusage and the allegation that the indictment was constructively amended by the evidence at trial. The Court has previously addressed the surplusage issue and need not repeat that discussion here; it will suffice to say that Alhalabi's arguments do not persuade the Court that its earlier ruling was erroneous.

Alhalabi's constructive amendment argument is likewise without merit. It was not error to allow the government to present evidence of unauthorized LINK card transactions in addition to those specifically alleged; that evidence was relevant and admissible to prove the scheme to defraud alleged in Counts 1, 2, and 3. This evidence did not impermissibly broaden the basis for a conviction on any of

the charges. The Court has previously (in this ruling and during the trial) dealt with Alhalabi's other points on the issue of constructive amendment and reaffirms those rulings.[1]

Conclusion

For the reasons stated above, the Court denies defendant's motion in arrest of judgment, for a judgment or acquittal, or for a new trial [docket # 90-1, 90-2, & 90-3]. Sentencing will proceed as scheduled on April 19, 2005 at 1:30 p.m.

s/ Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

Date: April 8, 2005

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1. The Court notes that contrary to Alhalabi's contention, the jury was not instructed that it could convict him on Counts 4 through 6 if it was proved that he "knowingly redeemed food stamp benefits in exchange for cash through the use of an access device." Rather, the instructions, as noted above, required the jury to find that Alhalabi had "knowingly acquired Link card benefits in a manner contrary to law," which was consistent with the allegations of Counts 4 through 6, not a constructive amendment of those charges.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 8, 2006

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 8, 2006

Before

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

Hon. DIANE S. SYKES, *Circuit Judge*

No. 05-2209 & 05-2591

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABDUL K. ALHALABI,

Defendant-Appellant.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by Defendant-

Appendix C

Appellant on April 25, 2006, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.*

Accordingly, the petition for rehearing is DENIED.

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* Chief Judge Flaum did not participate in the consideration of this petition for rehearing.